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No. 80-2095

In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

WILLIAM A. PASCARELL, ACTING REGIONAL DIRECTOR
OF THE TWENTY-SECOND REGION OF THE
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly concluded (a) that the Regional Director of the National Labor Relations Board had "reasonable cause to believe" that petitioners were violating the secondary boycott provisions of the National Labor Relations Act by reaffirming and placing into effect the Rules on Containers, and (b) that the issuance of an injunction pursuant to Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), restraining the parties from effectuating that agreement pending the final determination of the unfair labor practice charges by the Board, was "just and proper."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 650 F.2d 19. The opinion of the district court (Pet. App. 176a-192a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a-10a) was entered on May 20, 1981. The petition for a writ of certiorari was filed on June 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the appendix to this brief (*infra*, pages 1a-3a).

STATEMENT

1. This case is the latest stage of the litigation involved in determining whether the Rules on Containers in the collective bargaining agreement between the International Longshoremen's Association ("ILA") and New York Shipping Association ("NYSA") and Council of North Atlantic Shipping Associations ("CONASA")—petitioners here—are a lawful work preservation agreement, or a "hot cargo" or secondary boycott agreement proscribed by Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e) ("the Act"). In *NLRB* v. *ILA*, 447 U.S. 490 (1980), this Court, by a 5-4 vote, held that the Board had applied the wrong standard in determining that the Rules on Containers were not a lawful work preservation agreement, and remanded the case to the Board to redetermine that question under the correct standard.[1] The Court emphasized that it is was not deciding "the proper definition of the work in controversy", and that the "question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand." *Id.* at

[1] The Court held that the Board had "focused on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping[,]" instead of focusing on the work of the longshoremen and "examin[ing] the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it." 447 U.S. at 507.

511 n.26. The Court further held that, if the Board finds on remand that the Rules have a lawful work preservation objective, it should then consider the further contentions that the shipping association members did not have the right to control the stuffing and stripping of containers,[2] adding that these contentions "present difficult and complex problems which are not properly before us." *Id.* at 512.

The Rules on Containers were inoperative from 1973 through 1980 as a result of injunctions obtained by the Board and of Board orders that had been enforced by the courts of appeals. On January 2, 1981, with those barriers having been eliminated by this Court's remand in *NLRB* v. *ILA*, *supra*, petitioners once again began to enforce the Rules (J.A. 292-293, 963-964).[3] Unfair labor practice charges were filed with the Board's Regional Director in Newark, New Jersey, by truckers and consolidators, alleging that the reaffirmation and implementation of the Rules violated Section 8(e) and Section 8(b)(4)(A) and (B) of the Act, 29 U.S.C. 158(e) and 158(b)(4)(A) and (B) (J.A. 17-27). The Regional Director found that there was reasonable cause to believe that the charges were meritorious and issued an unfair labor practice complaint (J.A. 28-41). Pursuant to the mandate of Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), the Regional Director petitioned the United States District Court for the District of New Jersey to enjoin petitioners from implementing the rules pending final resolution of the

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[2] See *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507 (1977).

[3] "J.A." refers to the joint appendix in the court of appeals, a copy of which has been lodged with the Clerk.

unfair labor practice charges by the Board (J.A. 10-15).[4]

2. a. The relevant facts, established by affidavit testimony and documentary evidence submitted to the district court, may be briefly summarized. Prior to the advent of modern containers and container ships,[5] shippers and shippers' agents delivered cargo in break bulk form—*i.e.*, on a piece-by-piece basis—to the head of the pier. Longshoremen employed by steamship companies assembled on pallets and in boxes and crates the individual pieces of cargo received at a pier. They then transported the consolidated cargo loads to the ship, hoisted the loads aboard, disassembled them and separately stowed each piece of cargo in the hold of the ship. Conversely, when longshoremen unloaded a ship, they assembled cargo loads on the ship, hoisted the loads onto the pier and disassembled the loads on the pier. (J.A. 910-912, 946-947.)

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[4] The Board has consolidated the underlying unfair labor practice case, the cases remanded by this Court, and other cases involving the same question for expedited hearing and determination by a single administrative law judge. The hearing before that judge closed on April 7, 1981, briefs were filed by the parties on July 6, 1981, and the matter is now awaiting the judge's decision.

[5] As this Court explained in *NLRB* v. *ILA*, *supra*, 447 U.S. at 494:

> Containers are large, reusable metal receptacles, ranging in length from 20 to 40 feet and capable of carrying upwards of 30,000 pounds of freight, which can be moved on and off an ocean vessel unopened. Container ships are specially designed and constructed to carry the containers, which are affixed to the hold. A container can also be attached to a truck chassis and transported intact to and from the pier like a conventional trailer.

With the advent of modern containers and container ships during the 1960s, a new intermodal transportation system developed. Under this system, a shipper with enough cargo to fill a container obtained an empty container from a steamship company, brought it by rail or truck to its place of business or to a warehouse where it stored its goods, and loaded or stuffed the container, using either its own employees or the warehouse employees. The container was then carried by truck or rail to the pier, where it was then moved onto the pier and subsequently loaded aboard ship by longshoremen, using specially designed equipment. The containers were moved and loaded intact, without any additional handling of the containers' contents by longshoremen. (J.A. 319-320, 334-341, 396, 415-417, 460-461, 498-506, 532, 793-795, 798.)

A shipper who did not have enough cargo to fill a container had the option of delivering the cargo in smaller units to the pier—where it could be handled in that form or stuffed into containers by longshoremen—or of contracting with a consolidator or non-vessel operating common carrier (NVOCC). If the shipper elected to use a NVOCC, the latter, as was the case before the advent of modern containers, arranged for the delivery of the cargo to a warehouse or other off-pier facility, where it was consolidated with other cargo bound for a common destination. After the introduction of modern containers, however, the NVOCC secured containers from the steamship companies and stuffed the consolidated cargo directly into the containers, instead of truck trailers or railroad cars, as before. The containers were then hauled to the pier, where, as with the full container loads of a single shipper, they were handled intact by longshoremen. (*Ibid.*)

The process was reversed with respect to import cargo. However, because of containerization, a practice called "short stopping" developed in the import trade. Thus, even when a container was fully loaded with cargo for a single consignee, it was not always feasible to haul the container directly to the consignee. Accordingly, full containers were frequently "short stopped"—hauled to trucking terminals near the pier, where they were stripped and their cargo transferred, either alone or consolidated with other cargo, into more suitable over-the-road equipment for delivery to the final destination. (J.A. 323-327, 387-393, 591, 596-600, 655-666, 705-709.)

When the shipping companies began offering to make containers available to shippers who booked passage on their ships, they published tariffs prescribing more favorable conditions for shippers of full container loads (FCL or FSL) than for shippers of less than container loads (LCL). NVOCCs could qualify for the more favorable tariff provisions by consolidating their customers' LCL cargo, stuffing it in a container, and themselves becoming the shipper of FCL or FSL cargo. NVOCCs also were able to assume full responsibility for the cargo transported under a single bill of lading issued by them. (J.A. 404, 407, 409, 698-699, 726-728, 847-852, 951-952.)

In addition to offering these cost savings to their customers, NVOCCs offered shippers fewer handling delays and less risk of cargo pilferage and damage, since the step of rehandling the cargo at the pier was eliminated. NVOCCs also offered other significant services that were not obtainable through break bulk loading of containers by longshoremen at the piers. These included arranging for and furnishing space on specific vessels through advance booking ar-

rangements, packing cargo in containers in the sequential order in which it will be delivered, and preparing all necessary documentation and coordinating all phases of the transport of the cargo. (J.A. 331-337, 341, 404, 407, 409-413, 418-420, 423-424, 528-529, 696-700, 713-716, 718-720, 832-836, 952-953.)

Finally, containerization permitted shippers to eliminate cargo handling in American ports through the bill of lading. By designating on the bill of lading that export cargo is to be shipped house-to-pier, and import cargo is to be shipped pier-to-house or house-to-house, the shipper can direct that the container move intact through American ports. (J.A. 830-831, 834, 847-852, 864-904.)

As the number of intact container loads of cargo moving across the piers increased, manhours worked by longshoremen were correspondingly diminished. In 1968, ILA and NYSA placed restrictions on the types of intact container loads to be handled by longshoremen through adoption of the Rules on Containers, and, in 1973, the parties, together with CONASA, added a supplement to promote enforcement of the Rules (J.A. 922-925, 931-935).*

In essence, the Rules apply to all containers owned or leased by steamship companies and provide that, if such containers are to be stuffed or stripped within 50 miles of the port, that work must be done either by the employees of the beneficial owners of the cargo or at the pier by longshoremen employed by

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* The final version of the Rules, which was incorporated in the 1974 collective bargaining agreement, is set forth in the appendix to the Court's opinion in *NLRB* v. *ILA*, *supra*, 447 U.S. at 513-522.

members of NYSA or CONASA.[7] The Rules provide for liquidated damages, presently set at $1000 per container, for any container handled in violation of the Rules.

b. Based on the foregoing facts, the Regional Director contended that the container stuffing and stripping work performed by NVOCCs, trucking companies, and warehouses for their shipper customers was not functionally equivalent to the assembly and disassembly work traditionally performed by longshoremen on the pier as a necessary incident of loading and unloading vessels, but instead was a different work function that had been inextricably integrated into a new and more sophisticated intermodal transportation system. Accordingly, insofar as the Rules sought to claim this stuffing and stripping work for longshoremen, they had an unlawful work acquisition, rather than a lawful work preservation, objective. The Regional Director further contended that, even if the Rules had a valid work preservation objective, they were unlawful as applied, because the steamship companies do not have the legal right to assign the stuffing and stripping work to longshoremen where the shippers' bills of lading direct that the container shall move intact, or to withhold containers from NVOCCs who perform stuffing work within 50 miles of the port.[8]

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[7] The supplement to the Rules carved out an exception permitting the stripping of FSL cargo within 50 miles of the port by other than the beneficial owner's employees, provided the cargo is stripped in a bona fide warehouse and warehoused there for at least 30 days.

[8] See Shipping Act of 1916, 46 U.S.C. (& Supp. III) 801 *et seq.*; Intercoastal Shipping Act of 1933, 46 U.S.C. (& Supp. III) 843 *et seq.*; *Sea-Land Service, Inc., & Gulf*

The district court concluded that the Regional Director's legal theory was "substantial and not frivolous," and thus that there was reasonable cause to believe that unfair labor practices in violation of Sections 8(e) and 8(b)(4)(A) and (B) of the Act, 29 U.S.C. 158(e), 158(b)(4)(A) and (B), were occurring (Pet. App. 189a-191a). The court accordingly granted the Regional Director's request for an injunction prohibiting implementation of the Rules pending a final Board determination of the unfair labor practice charges (Pet. App. 204a).

3. The court of appeals affirmed, holding that the district court had correctly determined, on the basis of the Regional Director's "substantial and not frivolous" legal theory, that there was reasonable cause to believe unfair labor practices were occurring (Pet. App. 7a-8a). The court of appeals further concluded that injunctive relief was "just and proper," explaining (*id.* at 8a): "[W]e cannot hold that the trial court erred in refusing to permit a change in the status quo by authorizing operation of the Rules, and putting the freight consolidators out of business, while the Board hearing went forward."

ARGUMENT

The court below correctly concluded that the Regional Director had reasonable cause to believe that the Rules on Containers violated the secondary boycott provisions of the National Labor Relations Act and that it was just and proper, within the meaning of Section 10(*l*) of the Act, to enjoin their imple-

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Puerto Rico Lines, Inc., & Puerto Rico Maritime Shipping Authority—Proposed ILA Rules on Containers, 20 F.M.C. 788 (1978), review pending, No. 78-1776 (D.C. Cir.).

mentation pending a final Board determination. No issue warranting review by this Court is presented.

1. Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), directs the Board's Regional Directors to apply for injunctive relief in the federal district courts whenever the Directors determine that there is reasonable cause to believe that certain unfair labor practices—most notably secondary boycotts and hot cargo agreements—have occurred. The action for an injunction under Section 10(*l*) is ancillary to the unfair labor practice proceeding before the Board. The injunction expires when the Board renders its final decision on the underlying unfair labor practice charge. See 29 U.S.C. 160(*l*); *Sears, Roebuck & Co.* v. *Carpet Layers*, 397 U.S. 655 (1970). Accordingly, in a proceeding for an injunction under Section 10(*l*), the court's inquiry is narrow:

> [T]he district court is not called upon to decide whether, in fact, a violation has occurred. The determination of this question is reserved exclusively for the Board with review by the Court of Appeals under section 10(e) and (f) of the Act. The inquiry of the district court is limited to a determination of whether the Board ha[s] reasonable cause to believe the Act was being violated as charged, and if it so concludes, it must grant such relief as it deems just and proper.

Wilson v. *Milk Drivers & Dairy Employees Union, Local 471*, 491 F.2d 200, 203 (8th Cir. 1974).

2. a. Petitioners contend (Pet. 8-11) that there is a conflict among the courts of appeals as to the standard to be applied in determining whether the Regional Director has established that there is reasonable cause to believe that a violation of the Act

has occurred. Petitioners assert (Pet. 9) that, in the Third, Fifth, Seventh, Eighth and Ninth Circuits, the reasonable cause standard is met where the legal theory on which the Regional Director proceeds is substantial and not frivolous. *Consolidated Express, Inc.* v. *New York Shipping Association*, 641 F.2d 90, 95 (3d Cir. 1981) and cases there cited; *Boire* v. *International Brotherhood of Teamsters*, 479 F.2d 778, 789-791 (5th Cir. 1973); *Squillacote* v. *Graphic Arts International Union*, 540 F.2d 853, 858 (7th Cir. 1976); *Hendrix* v. *Operating Engineers, Local 571*, 592 F.2d 437, 442 (8th Cir. 1979); *Kennedy* v. *Los Angeles Typographical Union, No. 174*, 418 F.2d 6, 8 (9th Cir. 1969). On the other hand, in the Second and Fourth Circuits, the reasonable cause standard is held to require a showing of "at least some significant possibility that the Board will enter an enforceable order" (*Danielson* v. *Joint Board of Coat, Suit, & Allied Garment Workers*, 494 F.2d 1230, 1244-1245 (2d Cir. 1974)), and an injunction is deemed unwarranted if the district court "is convinced that the [Regional Director's] legal position is wrong" (*Humphrey* v. *ILA*, 548 F.2d 494, 497-498 (4th Cir. 1977).[9] Even if there is a difference be-

[9] Contrary to petitioners' contention (Pet. 9), no "fourway split in the circuits has developed." In construing the reasonable cause standard, the First Circuit has held that the Regional Director's legal theory should be accepted if it is "not without substance." *Union De Tronquistas, Local 901* v. *Arlook*, 586 F.2d 872, 876 (1978), citing with approval, *Hirsch* v. *Bldg. & Constr. Trades Council of Philadelphia*, 530 F.2d 298 (3d Cir. 1976) (where the court applied the "substantial and not frivolous" standard). The Sixth and Tenth Circuits have applied the reasonable cause standard with no elaboration. See, *e.g.*, *AFTRA* v. *Getreu*, 258 F.2d 698, 699 (6th Cir. 1958); *Lawrence Typographical*

tween the two standards, however, there is no need for this Court to determine in this case which standard is correct. For, as we show below, it cannot be said that the Regional Director's legal position is clearly "wrong" or that there is no "significant possibility that the Board will enter an enforceable order." [10] Therefore, even under the Second and Fourth Circuits' allegedly more stringent reasonable cause standard, an injunction would have issued here.[11]

Union No. 570 v. *Sperry*, 356 F.2d 58 (10th Cir. 1966). The District of Columbia Circuit has not addressed the issue.

[10] Question 1 stated in the petition is inaccurate insofar as it suggests that the district court was required to issue an injunction here even though it had determined that "the basic theory advanced by the Regional Director is erroneous." The district court refrained from making that determination, recognizing that the "ultimate resolution of questions of fact and law is explicitly left to the Board" (Pet. App. 185a).

[11] Thus, in *Danielson* v. *Joint Board, supra*, the Second Circuit refused to sustain the issuance of an injunction under Section 10(*l*) upon finding that the General Counsel's legal theory was "a strained and wholly unnatural construction" of the Act which produced a result that Members of Congress "had [been] assured [by Senator Taft] was not intended by the secondary boycott provisions" of the Act (494 F.2d at 1237). Cf. *Danielson* v. *International Organization of Masters, Mates & Pilots*, 521 F.2d 747, 751 (2d Cir. 1975) ("In determining whether an injunction under § 10(*l*) should issue, it is well settled that the district court need not decide that an unfair labor practice has actually occurred but merely must decide whether the Board has reasonable cause to believe there has been a violation of the Act.").

In *Humphrey* v. *ILA*, *supra*, the Fourth Circuit noted (548 F.2d at 498) that, "while a temporary injunction should not issue unless there is some reasonable possibility that the Board will ultimately enter an enforceable order, the General Counsel's resolution of disputed issues of law and fact should

b. As shown (pages 4-8, *supra*), the Regional Director adduced evidence before the district court showing that, as a result of technological changes spawned by containerization, the assembly and disassembly work traditionally performed by longshoremen on the pier as a necessary incident of loading and unloading vessels had been replaced by a significantly different work function—container stuffing and stripping performed by NVOCCS, trucking companies, and warehouses as an integral and inseparable part of a new and more sophisticated intermodal transportation system. The Regional Director contended that, in these circumstances, the Rules on Containers—by claiming for longshoremen container stuffing and stripping work that could not be separated out without impairing the new integrated transportation system—represent not an effort to preserve work traditionally performed by longshoremen, but instead an attempt to acquire for longshoremen work that had not previously been theirs. Far from being patently erroneous, this legal theory—*i.e.*, that an attempt to acquire "new work" evidences an unlawful secondary objective—has been accepted by at least two courts of appeals. See *Carrier Air Conditioning Co.* v *NLRB*, 547 F.2d 1178, 1187 (2d Cir. 1976); *Associated General Contractors* v. *NLRB*, 514 F.2d 433, 438 (9th Cir. 1975). See also *NLRB* v. *Enterprise Ass'n of Pipefitters*, *supra*, 429 U.S. at 529-530 n.16; *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S.

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be accorded considerable deference in determining whether such possibility exists." Applying this standard, the court concluded that the General Counsel had established reasonable cause to believe that the same Rules on Containers involved here were violative of the Act and that an injunction should issue under Section 10(*l*). *Id.* at 500.

612, 648 (1967) (Harlan, J., concurring). Indeed, this Court, in remanding the container issue to the Board, noted that one of the questions to be considered by the Board was the validity of the argument—advanced by the truckers and consolidators—that "containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and employees of motor carriers has been completely eliminated." *NLRB* v. *ILA*, *supra*, 447 U.S. at 510-511.

The Regional Director further contended, on the basis of evidentiary submissions (see pages 7, 8 & note 8, *supra*), that, even if the Rules on Containers had a lawful work preservation objective, they nonetheless were applied in an unlawful manner insofar as they sought to acquire for longshoremen container work that the steamship companies, because of the shippers' bills of lading and the requirements of the Shipping Act, do not have the legal right to control. This alternative theory of why the Rules violate the secondary boycott provisions of the Act likewise cannot be said to be an impermissible interpretation of the statute in the light of this Court's decision in *Pipefitters*, approving the Board's right-to-control test, and the Court's recognition in *NLRB* v. *ILA*, *supra*, 447 U.S. at 511-512, that the application of that test to the situation here "present[s] difficult and complex problems" that the Board should consider on the remand.

3. Contrary to petitioners' contention (Pet. 11-13), the court below correctly concluded that the injunctive relief granted by the district court was "just and proper" in the circumstances of this case to terminate the probable unfair labor practices and to preserve the status quo pending Board adjudication of the unfair labor practice complaint.

Section 10(*l*) of the Act embodies the determination of Congress that certain unfair labor practices, particularly secondary boycotts and hot cargo agreements, are so harmful to the public welfare and engender such serious interruptions of commerce that their discontinuance, pending final adjudication by the Board, is essential to avert irreparable injury to the policies of the Act. See S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947); I NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 414, 433 (1948). Because the Board's Regional Directors seek injunctive relief "acting in the public interest and not in vindication of purely private rights" (S. Rep. No. 105, *supra*, at 8, I *Legislative History*, *supra*, at 414), "[t]he propriety of injunctive relief" under the "just and proper" standard "does not depend upon traditional equitable principles, but [on] whether it is necessary to effectuate policy as announced by Congress. It is just and proper when the circumstances of a case create a reasonable apprehension that the statutory remedial purposes will be frustrated in the absence of such relief." *Wilson* v. *Milk Drivers & Dairy Employees Union, Local 471*, *supra*, 491 F.2d at 203. Accord: *Hendrix* v. *Operating Engineers, Local 571*, 592 F.2d 437, 443 (8th Cir. 1979); *Union De Tronquistas, Local 901* v. *Arlook*, 586 F.2d 872, 877-878 (1st Cir. 1978); *Squillacote* v. *International Brotherhood of Teamsters, Local 344*, 561 F.2d 31, 35 (7th Cir. 1977); *Henderson* v. *Operating Engineers, Local 701*, 420 F.2d 802, 808 (9th Cir. 1969). See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 609-610 (1952) (Frankfurter, J., concurring) ("When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court

of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.").[12]

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[12] Notwithstanding petitioners' assertion (Pet. 11-12) that "[a]ll the circuits" apply the "just and proper" standard as a "separate and distinct test" based upon "traditional equitable principles," petitioners do not cite a single case in which a court of appeals affirmed the denial of 10(*l*) injunctive relief on equitable grounds where, as here, there was reasonable cause to believe an unfair labor practice was occurring and was likely to continue if not enjoined.

Thus, in both *Squillacote* v. *Graphic Arts International Union*, 540 F.2d 853, 859 (7th Cir. 1976), and *Hendrix* v. *Operating Engineers, Local 571*, 592 F.2d 437, 443 (8th Cir. 1979), the courts, although speaking in terms of equitable discretion, made plain that the overriding consideration in determining whether a 10(*l*) injunction was "just and proper" was the injury to the public that would result from permitting a secondary boycott, which the Regional Director has reasonable cause to believe was illegal, to continue pending a final Board determination. In *Danielson* v. *IBEW, Local 501*, 509 F.2d 1371, 1374-1376 (2d Cir. 1975), the court found that a 10(*l*) injunction was not warranted in circumstances where the Regional Director had waited some five weeks before appealing the district court's finding of lack of reasonable cause to believe that a violation of the Act had occurred, and the construction projects with which the union was allegedly interfering had been completed. (Cf. Pet. App. 8a, where the court below recognized that the district court could "decline an injunction when there was no actual threat that the unfair labor practice charged before the Board was likely to continue pendente lite.") Finally, *Boire* v. *International Brotherhood of Teamsters*, 479 F.2d 778, 788-789 (5th Cir. 1973), involved the standards for granting injunctive relief under Section 10(j) of the Act, 29 U.S.C. 160(j), where the courts may have a greater degree of discretion in determining whether an injunction would be "just and proper" than they have under Section 10(*l*). See *Eisenberg* v. *Hartz Mountain Corp.*, 519 F.2d 138, 143 n.5 (3d Cir. 1975); *Squillacote* v. *Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 743-744 (7th Cir. 1976).

The court below found that the Regional Director had reasonable cause to believe that petitioners' reaffirmation and implementation of the Rules on Containers were violative of the Act, and that their implementation would "drastically alter" the status quo and disrupt commerce by "depriving the freight consolidators and their employees of business they had enjoyed for years" (Pet. App. 6a, 8a). It thus properly concluded that an injunction against implementation of the Rules, pending final Board action, was "just and proper" to effectuate the policies of the Act.[13]

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[13] Because the court of appeals found that the Regional Director had satisfied the statutory requirements for Section 10(*l*) relief, it did not, as petitioners contend (Pet. 13-14), abdicate the powers conferred on it by Article III of the Constitution. By according deference to the Regional Director's legal theory, which it found to be "substantial" (Pet. App. 7a-8a), the court below exercised a judicial function similar to that performed by appellate courts in reviewing final Board orders under Sections 10(e) and 10(f) of the Act, since in such cases they often defer to Board interpretations of the statute that they find are reasonable. See *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). By finding that the injunction granted by the district court was "just and proper" to preserve the status quo and prevent interruptions to commerce, the court below applied a standard that Congress could constitutionally establish as a basis for obtaining injunctive relief.

Finally, there is no merit to petitioners' contention (Pet. 16) that the district court lacked jurisdiction to grant 10(*l*) relief in this case because "[a] district court is divested of § 10(*l*) jurisdiction when a controversy has been presented to an appellate court." The predicate for Section 10(*l*) jurisdiction in this case was the petition filed by the Regional Director based on new charges alleging as unfair labor practices conduct which occurred in December 1980 and January 1981—subsequent to the appellate court orders remanding to the Board the earlier cases involving the Rules on Containers. Moreover, as the court below correctly observed

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(Pet. App. 6a-7a), although appellate courts might have the power to enforce Board orders pending remand to the Board (see 28 U.S.C. 1651), where, as here, the Board orders have been vacated, the predicate for *exclusive* jurisdiction under Sections 10(e) and 10(f) has been removed. Thus, the district court's jurisdiction to grant 10(*l*) relief pending Board adjudication, on remand, is not preempted. *Great Western Broadcasting Corp.* v. *Hoffman*, 214 F. Supp. 173 (N.D. Cal. 1963), relied on by petitioners (Pet. 15-16), is not to the contrary. There, the court's holding that it lacked jurisdiction to entertain a Section 10(*l*) petition in connection with a case remanded to the Board by the Ninth Circuit was based on its determination that the court of appeals had "retained jurisdiction of that action, with the remand order affecting only particular portions of the cause." 214 F. Supp. at 177 (citation omitted).

APPENDIX

The relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*) are as follows:

1. Section 8(b), 29 U.S.C. 158(b):

It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person * * * to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *.

2. Section 8(e), 29 U.S.C. 158(e):

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void:
* * *

3. Section 10(*l*), 29 U.S.C. 160(*l*):

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon

the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law * * *.

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